IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL Nos. 338 to 342 of 2006
With
CIVIL APPLICATION Nos.1751 to 1755 of 2006

Date of decision: 13/2/2006

==========

NATIONAL INSURANCE CO. LTD - Appellant(s)
Versus
LAKHUBEN PUNABHAI VAGHARI & 5 - Defendant(s)
(For full cause title, see next page)

Coram:

The Hon'ble Mr.Justice Bhawani Singh,Chief Justice

The Hon'ble Smt.Justice Abhilasha Kumari,Judge

Whether approved for Reporting?

Appearance :
MR SUNIL B PARIKH for Appellant(s) : 1,
None for Defendant(s) : 1 - 6.

==========

(Per : THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI (ORAL)

1. Through this common judgment, we propose to dispose of five First Appeals, namely, First Appeal Nos.338, 339, 340, 341 and 342 of 2006, all of which

.....

Whether Reporters of Local Papers may be allowed to see the judgment?

have been filed by the appellant Insurance Company against the common judgment and award of the Motor Accident Claims Tribunal (Main), Ahmedabad (Rural) dated 20.9.2005, in M.A.C.P.Nos.942, 943, 944, 945 and 946 of 1998. Since these appeals, arise out of the same accident, the factual matrix is the same in all the cases.

2. It is stated that the accident took place on 19.5.1998 at about 1.30 P.M. A truck No.GJ-4U-9286 was being driven by its driver on the road going from Vataman Cross Road to Dholer. As per the case of the claimants, on the aforesaid date all the deceased persons, namely, Ramubhai Punabhai, Savaben Ramubhai, minor Tiniben, Rameshbhai Chaturbhai and minor Vijaykumar Rameshbhai, were going alongwith their goods in the aforesaid truck from Vataman Cross Road to their village Buranpur. Due to the rash and negligent driving of the driver of the truck, while over taking one tractor going ahead, the truck turned turtle and the accident took place. All the persons who had boarded the truck from Vataman Cross Road

came under the truck and sustained severe injuries, which proved to be fatal. Claim petitions were filed by the legal heirs and representatives of the deceased persons. The written statements were filed by the present appellant as the insurer of the offending truck in all the claim petitions, denying the averments and allegations made therein and disclaiming its liability to pay the compensation. Issues were framed by the M.A.C.Tribunal and after examining the oral and documentary evidence on record, the M.A.C.Tribunal came to the conclusion that the driver of the truck was negligent in causing the accident and resultant death of the deceased persons. Further, it was found that the deceased persons were travelling in the truck alongwith their goods and as such, they were not gratuitous passengers. The owner of the truck and the Insurance Co. were held to be jointly and severally liable since the truck was found to be insured at the time of the accident. The M.A.C.Tribunal awarded compensation to the tune of Rs.1,93,000/- in M.A.C.Petition No.942 of 1998, Rs.1,93,000/- in M.A.C.Petition No.943 of 1998, Rs.1,50,000/- in

M.A.C.Petition No.944 of 1998, Rs.1,93,000/- in M.A.C.Petition No.945 of 1998 and Rs.1,50,000/- in M.A.C.Petition No.946 of 1998.

3. In the present appeals, the appellant has taken a number of grounds but only two grounds have been pressed before us in support of the appeals. We have heard learned counsel for the appellant Shri Sunil B.Parikh and have gone through the material on the record. Firstly, it has been contended that the M.A.C.Tribunal erred in appreciating the FIR and panchanama at Exh.36 and 37 in which it is clearly mentioned that the truck was fully loaded with fertilizer and the persons travelling in the truck were picked up and seated in the truck from the road and therefore, there is no question of their travelling alongwith their goods in the truck. Secondly, it has been contended that the M.A.C.Tribunal has erred in appreciating the fact that there was no specific evidence to the effect that the passengers were travelling alongwith their goods, as they had not hired the entire truck. There

was no documentary evidence such as receipt of goods, consignment note, receipt of fare etc. and therefore, the conclusion arrived at that the deceased persons were traveling in the truck alongwith their goods, and were not gratuitous passengers, is not supported by any evidence.

4. In the claim petitions filed by the claimants it has been specifically stated that on 19.5.98 the deceased persons had come to Vataman Cross Road after purchasing goods and at that point they had hired truck No.GJ-4U-9286 alongwith their goods and were going to their village Buranpur.In the written statement filed in the claim petitions by the present appellant there is no specific denial that the deceased persons were travelling, alongwith their goods in the truck which was insured with them at the relevant time. The learned counsel for the appellant, in support of his contention that there is no evidence to the effect that the deceased persons were travelling in the truck alongwith their goods,has mainly relied upon the complaint dated 19.5.98 filed in the Police Station by the conductor of the truck.

It is contended that in the complaint there is no mention of the goods being carried by the deceased and it only mentions that the truck was loaded with fertilizer and when the accident took place, the deceased persons, who were travelling in the truck, were pressed under the fertilizer. Reliance has also been placed upon the panchanama, in which there is no mention about the goods of the deceased persons.

5. After hearing the learned counsel for the appellant and going through the material on record, we are unable to agree with the aforesaid contentions urged by the learned counsel for the appellant. It is not disputed that in the claim petitions there is a clear and specific averment that the deceased persons were carrying goods and had boarded the truck alongwith their goods. Apart from the general denial of the averments therein, the appellant, in the written statement filed before the M.A.C.Tribunal, has not specifically denied this averment that the deceased were travelling in the truck alongwith their goods. Moreover, this fact would have been clarified had the driver of the offending truck been examined

by the present appellant, but this has not been done. It should be kept in mind that the complaint was filed by none other than the conductor of the offending truck,after the driver ran away from the spot when the accident took place. The fact that there is no mention of the goods of the deceased in the panchanama by the Panchas does not disprove the specific averment made by the claimants that the deceased persons were travelling in the truck alongwith their goods. It is possible that while extricating the dead bodies from under the heavy quantity of fertilizer, the goods might not have been visible as the main aim was to bring out the dead bodies of the persons buried under the fertilizer and not to salvage the goods of the deceased persons.

6. It is now settled by a catena of decisions of the Supreme Court that all defences are to be proved by the insurer like the appellant. In the face of this specific averment in the claim petitions that the persons were travelling alongwith their goods, the onus to disprove this averment rests upon the appellant Insurance Co. Had the appellant – Insurance

Company discharged this onus, it would have gone a long way in proving whether, or not, the deceased persons were gratuitous passengers. Unfortunately, it has failed to do so and has not even brought the driver of the offending truck into the witness box. The burden to prove the breach of a term of contract rests squarely on the party which complains of such breach. The test which can be applied in such a situation would be that which party would fail if no evidence is led or the onus is not discharged. In the present case, the answer would be the appellant-Insurance Company. In this behalf, reference can be made to 1985 ACJ 397 (Narcinva V. Kamat v. Alfredo Antonio Doe Martins) and 2004 ACJ 1 (National Insurance Co.Ltd. v. Swaran Singh). In National Insurance Co.Ltd. v. Swaran Singh (Supra) the Supreme Court has observed as under:

> "62. the proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See Sohan Lal Passi, 1996 ACJ 1044 (SC)."

> "102 ((i)**********
>
> (ii) **********
>
> (iii)**********
>
> (iv)The Insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle, the burden of proof wherefor would be on them.
> (v)The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case."

7. Applying the ratio of the law laid down by the Supreme Court, as referred to above, it is evident that the appellant, in the present case has failed to lead any evidence in order to prove that the deceased persons were gratuitous passengers who were travelling in an unauthorised manner in the truck and without any goods. The specific averment in the claim petition that the deceased persons were travelling in the truck alongwith their goods has not been dislodged during the entire proceedings before the M.A.C.Tribunal and in the absence of any evidence or material on record to the contrary, it has rightly

been relied upon by the M.A.C.Tribunal to come to the conclusion that the deceased persons were travelling in the truck alongwith their goods and, as such they were not gratuitous passengers. Having failed to discharge the burden of proof in support of this contention, it is not open to the appellant at this stage to try and bring about a re-appraisal of the evidence on facts. There is no reason for this Court to go into the factual aspect of the matter or enter into a re-appraisal of evidence since the impugned judgment and award does not suffer from any illegality or perversity.

8. For the reasons hereinabove, we are of the considered opinion that there is no merit in the appeals filed by the appellant. Accordingly the same are summarily dismissed. Amount deposited in the Registry under Section 173 of the Motor Vehicles Act, 1988, be transmitted to the Tribunal concerned for payment to the claimant(s) along with the amount to be deposited as per the Award within two months.

9. In view of the dismissal of the Appeals, as

above, the Civil Applications for staying the execution of the award do not survive and the same stand disposed of accordingly.

(Bhawani Singh)
Chief Justice

(Smt.Abhilasha Kumari)
Judge

arg